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IN THE

Supreme Court of the United States

KODAK RETIREMENT INCOME PLAN AND
KODAK RETIREMENT INCOME PLAN COMMITTEE,
Petitioners,

v.

SALLY J. BURKE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE ERISA INDUSTRY COMMITTEE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF THE ERISA INDUSTRY COMMITTEE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The ERISA Industry Committee ("ERIC") respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari in this case. Letters from petitioners and respondent indicating consent to file have been filed with the Clerk.[1]

INTEREST OF AMICUS CURIAE

ERIC is a nonprofit organization representing America's largest private employers. These are companies that maintain ERISA-covered pension, healthcare, disability, and other employee benefit plans, providing benefits to millions of active workers, retired persons, and their families nationwide. All of ERIC's members do business in more than one State, and many have employees in all fifty States. ERIC frequently participates as an amicus in cases with the potential for far-reaching effects on employee benefit plan design or administration.[2]

ERIC and its member companies have a vital interest in this case, which deepens an existing circuit split and allows participants of ERISA plans to recover benefits based on the terms of a Summary Plan Description ("SPD"), rather than the terms of the applicable Plan Document, without demonstrating that they detrimentally relied on the SPD. If allowed to stand, the decision below will upset the delicate balance

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[1] Pursuant to Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part. No person or entity, other than ERIC and its members, made a monetary contribution to the preparation and submission of this brief.

[2] *See, e.g.*, *Black & Decker Disability Plan v. Nord*, 123 S. Ct. 1965 (2003); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

that Congress struck, in enacting ERISA, between encouraging employers to sponsor employee benefit plans and protecting employees via appropriate disclosures. The Second Circuit's ruling has the effect of creating unpredictable liabilities for ERISA plans and, if allowed to stand, will cause additional expense in the administration of plans and undermine their financial viability, to the detriment of both the employers and the employees whose contributions fund the plans.

Because of the importance of these issues to ERIC and its members, ERIC respectfully submits this brief urging the Court to grant the petition for certiorari, reverse the decision below, and require that participants seeking benefits based on an error or omission in an SPD first establish that they detrimentally relied on the SPD.

REASONS FOR GRANTING THE WRIT

The petition in this case presents a question of unusual importance to employers throughout the nation who sponsor employee benefit plans: whether an employee who seeks benefits based *not* on the terms of the plan itself, but on the basis of a statement or omission in a document summarizing and describing the plan (the "Summary Plan Description" or SPD), must show that he or she detrimentally relied on the SPD's statement or omission in order to obtain the additional, extra-plan benefit. As explained below, *infra* at 6-11, although this question is nominally framed as a simple question of the evidentiary proof required to recover benefits under ERISA § 502(a)(1)(B), identifying the correct answer to that question implicates issues of the most fundamental order concerning the nature and scope of the protection ERISA confers on the benefits provided under the terms of employee welfare and health plans.

Certiorari should be granted to answer that question for two reasons. First, whatever the ultimate answer may be, a conclusive resolution by this Court would be an improve-

ment over the current state of the law, which is in utter disarray. As matters stand now – and as they will continue to stand unless and until this Court intervenes – almost all of the circuits have addressed the issue. The rule in some is that the SPD can create benefit rights that trump the plan as a matter of law; in others it is that the SPD can trump the plan only if the SPD is deemed "prejudicial"; still others hold that the SPD will trump the plan only if the employee actually and reasonably relied to her detriment on the description of benefits contained in the SPD. This is not a recipe for the effective and efficient administration of employee benefit plans, especially those with nationwide reach. It is instead a guaranteed prescription for inequity, as well as increased costs and, therefore, increased pressure to reduce overall benefits.

Second, certiorari should be granted because the decision below is wrong and must be reversed, if this Court is to hold ERISA true to its promise of protecting the contractual benefit rights afforded *under the terms of benefit plans* while still preserving the right of employers and other plan sponsors to decide for themselves what benefits those plans should provide. It is one thing to say that, even though ERISA protects only those rights afforded under the plan itself, a court may enforce additional rights stated in or implied from an SPD, where the employee actually and reasonably relied on the SPD's description of plan benefits. It is another thing entirely to say that the SPD can create extra-plan rights *even where the plaintiff has not acted in reliance on the SPD.* Courts allow rights to be derived from the SPD because they think it unfair to deny recovery to an employee or beneficiary who was misled by a deficient SPD. But if the employee did not rely on the SPD then she necessarily was not misled by it, and there is thus no warrant for granting the employee benefits unavailable under the terms of the plan itself.

This Court should grant certiorari to resolve the deep and intolerable split in the circuits and to make clear that detri-

mental reliance is a prerequisite to any recovery of extra-plan benefits based on statements and omissions in an SPD.

A. Certiorari Should Be Granted To Resolve The Circuit Split And Establish Nationwide Uniformity On An Issue Directly Affecting Employee Benefit Plan Administration

The petition amply demonstrates the division among the circuits on the question presented in this case. The circuit conflict is acknowledged in the decision below, in other decisions and in the treatises, and need not be restated here. It suffices to say that nine of the circuits have addressed this issue, and that among them they have adopted four different rules of law applicable to actions seeking benefits on the basis of statements or omissions. *See* Pet. 8-19.

A circuit split that wide and deep would be more than sufficient reason to grant certiorari in a case of any kind. Amicus ERIC and its members submit, however, that the need for review is even more pressing here, because the issue that has so sharply divided the circuits is an issue that directly and materially affects the administration of nationwide employee benefit plans.

This Court has acknowledged the unique importance of ensuring uniformity and certainty under ERISA, given "the comprehensive nature of the statute, the centrality of pension and welfare plans in the national economy, and their importance to the financial security of the Nation's work force." *Boggs v. Boggs*, 520 U.S. 833, 839 (1997). ERISA was enacted specifically to supplant the common-law system of varying state-by-state regulation of employee benefit plans with a single federal regulatory scheme, to provide both the sponsors and the beneficiaries of such plans a measure of stability and security in the enforcement of the laws governing benefit plans. As this Court has explained:

> An employer that makes a commitment systematically to pay certain benefits undertakes a host of obliga-

> tions, such as determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records in order to comply with applicable reporting requirements. The most efficient way to meet these responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits. Such a system is difficult to achieve, however, if a benefit plan is subject to differing regulatory requirements in differing States.

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 9 (1987). ERISA thus reflects a "congressional mandate for the[] uniform and comprehensive regulation" of employee benefit plans. *Boggs*, 520 U.S. at 836. Ensuring a system of "nationally uniform plan administration" is a "core . . . concern" of the statute. *Egelhoff v. Egelhoff*, 532 U.S. 141, 147-48 (2001).

The current disuniformity and inconsistency among the circuits on the question of what a plaintiff must prove to recover benefits on the basis of statements or omissions in an SPD directly flouts the congressional mandate and core concerns underlying ERISA. Allowing that controversy to persist would have numerous adverse effects on plans and their beneficiaries. For instance, large benefit plans currently face the risk that some plan beneficiaries will be entitled to recover benefits unavailable to others in the same plan based simply on where the beneficiary is located or elects to sue. There is nothing sensible or fair about that result. Further, to avoid the inconsistent adjudication of challenges based on SPDs, plan administrators may be tempted to "load up" the SPD with extensive nuance to avoid all such challenges, even though the entire point of the SPD is to speak in plain and understandable terms without all the technical detail that is inherent in formal plan documents. *See* 29 C.F.R.

§ 2520.102-2(a); *Herrman v. Cencom Cable Assocs., Inc.*, 978 F.2d 978, 984 (7th Cir. 1992) ("Larding up the summary with minutiae would defeat that document's function: to provide a capsule guide in simple language for employees."); *Lorenzen v. Employees Ret. Plan of the Sperry & Hutchinson Co.*, 896 F.2d 228, 236 (7th Cir. 1990) (law should not be construed to result in SPDs that are "choked with detail and hopelessly confusing"). There is nothing sensible or fair about that result either. And, of course, inconsistency in the laws governing plans with nationwide scope creates unpredictable plan liabilities, which necessarily increases the costs of providing benefits, which in turn leads inevitably to decreased benefits. *See Fort Halifax*, 482 U.S. at 11 ("A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them."). There most certainly is nothing fair or sensible about that result.

While this Court's certiorari jurisdiction exists in part to ensure nationwide uniformity of federal law on any issue, Congress has made clear that such nationwide uniformity is especially important in cases involving the administration of employee benefit plans. This is such a case. Certiorari should be granted to resolve the costly and unproductive conflict among the circuits over the question whether a plaintiff seeking to recover extra-plan benefits based on representations in an SPD must prove reliance on the SPD.

B. Proof Of Detrimental Reliance Should Be Required In All Actions Seeking To Recover Extra-Plan Benefits On The Basis Of Statements Or Omissions In SPDs

The petition for certiorari accurately and effectively summarizes the principal doctrinal reasons that any plaintiff seeking to obtain benefits on the basis of statements or omissions in the SPD should be required to demonstrate that he or

she relied to his or her detriment on those statements or omissions. ERIC endorses that analysis and will not repeat it here. Instead we briefly set forth the broader legal context in which this issue is situated – a context which confirms the conclusion that reliance on the SPD must be required in cases of this nature.

Analysis of the question whether a plaintiff seeking to obtain benefits based on an SPD must have relied on that SPD must begin with the recognition that the plaintiff's right to such benefits is *not* protected by ERISA itself. As elaborated below, ERISA protects only benefits provided under *the terms of the plan*. *See* 29 U.S.C. § 1132(a)(1)(B). Whatever protections may exist for "rights" created by an SPD are entirely the product of judicial decisions, which have imposed such protections for equitable reasons.

This case illustrates the distinction between true "plan benefits" and "SPD benefits" of the type at issue here. It is undisputed that respondent in this case is *not* eligible for survivor income benefits under the terms of the Kodak Income Retirement Plan ("the Kodak Plan"). Specifically, respondent failed to submit a joint affidavit required by the Kodak Plan to establish "domestic partner" status and thus entitlement to survivor benefits as a domestic partner. The Second Circuit nevertheless held that respondent is entitled to survivor income benefits, on the ground that the SPD distributed to Kodak employees omitted the joint affidavit requirement. When an SPD "conflicts" with the terms of a plan, the Second Circuit held, "the SPD controls" the benefits available under a plan, Pet. App. 10a, at least insofar as it is "likely" that a plan participant or beneficiary was "harmed" by a misstatement or omission in the SPD, *id.* at 16a.

Thus, in allowing respondent to recover benefits on the basis of an omission in the SPD without requiring reliance, the Second Circuit presupposed that there are *any* circumstances in which an SPD can create enforceable rights to extra-plan benefits. Even if that premise is correct, it is impor-

tant at least to recognize that the "right" to recover extra-plan benefits is a judge-made right that is not conferred by ERISA itself.

ERISA does not create substantive rights to benefits of any kind. "Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996); *see Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985) (ERISA "does not regulate the substantive content of welfare-benefit plans"). The rights protected by ERISA are, rather, exclusively contractual in nature. That is, an employer may or may not choose to create an employee benefit plan, but if it does create one, ERISA treats the rights conferred under the plan as contractual and establishes a federal scheme for regulating and enforcing those contractual rights. *See Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (describing plan as "contract" and plan benefits as "contractually authorized"). In accordance with that scheme, an action to recover benefits under § 502(a)(1)(B) is regarded as "a suit to recover benefits due *under the plan*, to enforce rights under *the terms of the plan*, and to obtain a declaratory judgment of future entitlement to benefits *under the provisions of the plan contract*." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108 (1989) (emphasis added).

Inasmuch as ERISA itself only protects benefits provided under the terms of the "plan contract," it follows that any "right" to benefits beyond those provided by the terms of the plan contract must have its source elsewhere. In the case of rights resulting from misstatements or omissions in an SPD, that source has been equity. It is simply "unfair," many courts have held, for an employer to distribute an SPD to employees for the purpose of explaining plan benefits, and then to favor an inconsistent plan provision over the SPD's

description of the plan *when the employee has relied on the SPD*. As the leading case for this principle put it:

> It is of no effect to publish and distribute a plan summary booklet designed to simplify and explain a voluminous and complicated document, and then proclaim that any inconsistencies will be governed by the plan. Unfairness will flow to the employee *for reasonably relying on the summary booklet.*

McKnight v. Southern Life & Health Ins. Co., 758 F.2d 1566, 1570 (11th Cir. 1985) (emphasis added); *see Heidgerd v. Olin Corp.*, 906 F.2d 903, 908 (2d Cir. 1990) (quoting *McKnight*); *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 982 (5th Cir. 1991) (same); *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988) (same).

It is thus evident that a requirement of reasonable reliance is presumed by, and inherent in, the very reason that plan participants have been allowed to recover extra-plan "SPD benefits" in the first place. The point can be put two ways. First, one can say that absent reasonable reliance, the basic unfairness that justifies recovery for an SPD misstatement or omission is simply lacking. That is, while it may be unfair to deny recovery to an employee who was misled by an SPD, if the employee did not see or otherwise rely on the SPD, it is impossible to say that he or she was misled by it. It is thus not unfair, in any way, to deny recovery of benefits on the basis of an SPD error on which the employee did not rely.

Second, as a more formal matter, one can say that absent reasonable reliance, the employee cannot satisfy the legal requirements for recovery of a right established not by the plan contract, but by equity. The judge-made "right" to an extra-plan "SPD benefit" is tantamount to an application of the equitable principle of promissory estoppel: even though a "promise" contained in or inferred from an SPD is not enforceable as part of the plan contract, courts will enforce the

promise if the employee relied to his or her detriment on it. *See generally* Stanley D. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 Yale L.J. 343, 344 (1969) ("the basic elements of promissory estoppel doctrine have been fashioned in the context of the explicit assumption that the doctrine properly operates outside the bargain relationship"). Proof of detrimental reliance is, of course, inherent in any claim of promissory estoppel. *See Restatement (Second) of Contracts* § 90 (1981). It follows that a court has no legal basis for enforcing a "promise" suggested in an SPD in the absence of reasonable reliance.

However the point is made, what matters is that any right to obtain extra-plan benefits pursuant to an SPD misstatement or omission *necessarily* presupposes reasonable reliance by the employee asserting such a right. Without such reliance, there is no legal principle that would allow an employee to recover benefits beyond what the employer chose to provide in the terms of the plan. To the contrary, this Court has repeatedly made clear that under ERISA, employers remain free to decide for themselves what substantive benefits to provide. *See supra* at 8.

It is no answer to say, as the Second Circuit did in this case, that requiring reliance would be inconsistent with "ERISA's objective to protect the employee against inadequate SPDs," Pet. App. 14a, and that "[t]he consequences of an inaccurate SPD must be placed on the employer" rather than the employee, who is "less equipped to absorb the financial hardship of the employer's errors," *id.* at 15a. These formulations do nothing more than reiterate the fairness point already discussed, and thus do not respond to the observation that a rule based on fairness presupposes a reliance requirement. In other words, there is no need to "protect the employee against [an] inadequate SPD[]" if the employee never relied on the SPD; there are no "consequences" of an inaccurate SPD when nobody has relied on the SPD; and

there will be no "financial hardship" resulting from errors in an SPD when there is no reliance on the errors.

In short, as matter of both logic and law, it is impossible to avoid requiring a plaintiff who seeks to obtain benefits not on the basis of the plan contract, but on the basis of a statement or omission in the SPD, from demonstrating that he or she acted in reasonable reliance on the SPD's representations.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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